ADVOCATES
FOR HIGHWAY
AND AUTO SAFETY

750 First Street, N.E., Suite 901
Washington, D.C. 20002

December 31, 2002

Docket Nos.: FMCSA-1999-6480; FMCSA-2000-7006; FMCSA-2000-7165; FMCSA-2000-7363; and, FMCSA-2000-8203
Dockets Management Facility
Room PL-401
U.S. Department of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590

Qualification of Drivers; Exemption Applications; Vision
67 FR 71610, December 2, 2002

Advocates for Highway and Auto Safety (Advocates) files these comments regarding the Federal Motor Carrier Safety Administration=s (FMCSA) notice announcing the agency=s decision to grant 44 applicants an additional two-year exemption[1] from the federal vision requirement, 49 Code of Federal Regulations 391.41(b)(10).

The statute governing exemptions from the Federal Motor Carrier Safety Regulations (FMCSR) requires that, for each and every application for exemption, the Secretary Ashall give the public the opportunity to inspect the safety analysis and any other relevant information known to the Secretary and to comment on the request.@ 49 U.S.C. ' 31315(b)(4). The statute requires the Secretary to disclose relevant information to the public for its review in order to provide comment regarding the application. In the case of exemption applications from drivers who have already received a previous two-year exemption, the FMCSA has dispensed with the formality of informing the public with regard to specific Arelevant information@ of each applicant, including the need to disclose any information about the applicant's driving record during the prior two-year exemption. This is a substantive breach of the public disclosure requirements of the statute.

FMCSA has decided that updated factual information regarding the driving record of prior exemption applicants does not have to be disclosed to the public before granting a second exemption request. The instant notice, and other similar notices termed Arenewals@ by the agency, do not provide individualized information regarding the driving history of each applicant during the two-year exemption period that immediately preceded the application for an additional, second or third, two-year exemption. This is precisely the type of information that

[1] Two of the 44 applicants have been granted a third two-year exemption.

the agency relies on and discloses prior to granting the initial exemption to each applicant. The summary information regarding applications for a subsequent two-year exemption is not individualized and is presented *en masse*, in a manner which does not afford the public any Aopportunity to inspect the safety analysis and any other relevant information known to the Secretary.@ *Id.* The agency notice provides only a cursory statement that each of the applicants has provided sufficient information to qualify for another exemption, but does not disclose the underlying facts and basic information it relies on to come to that conclusion. No factual recitation is provided regarding the driving experience, crash and citation record of each applicant during the prior two-year exemption period B records that are directly relevant to the application for an additional two-year exemption. Although the agency makes specific reference to the fact that each applicants= vision impairment remains stable, the agency summarily concludes that Aa review of their records of safety while driving with their respective deficiencies over the past 2 years indicates each applicant continues to meet the vision exemption standards.@[2] 67 FR 71610, 71611 (Dec. 2, 2002).[3] The agency does not disclose the pertinent driving record information or its analysis to the public, nor does it place these materials in the docket. Even if this information does not disqualify a driver from consideration of an additional two-year exemption based on the screening criteria, the agency is required to provide the public with the specific information on which its safety determination is based. Using this secret information, however, FMCSA unilaterally concludes that each applicant should be granted another two-year exemption. *Id.* As a result, the public cannot form its own views, raise specific factual questions or provide fact-specific informed comment.

Advocates has repeatedly raised the contention that FMCSA, in violation of its statutory responsibility and regulatory practice for granting exemptions, has failed to disclose material information regarding the specific driving records of individual applicants during their first two-year exemption. Although the agency has repeatedly claimed that it addressed this specific contention, i*d. citing* 66 FR 17994 (April 4, 2001), the agency did not, in fact, explain its failure to disclose relevant factual information. Rather, in the April 4, 2001 notice the agency merely defends the basis for its summary procedures in making the exemption determination. In the cited notice the agency claimed that its evaluation of the two-year driving record of each applicant, coupled with previously known information derived from the prior application process, indicates that each applicant continues to meet the agency=s criteria for the granting of an exemption to the vision standard. But the agency does not, either in that nor any other notice, explain why the it does not set forth the specific driving record during the prior two-year

[2]Advocates is unaware of any Astandards@ for vision exemptions. Rather, the exemptions are exceptions to the formally adopted vision standard and are based on surrogate screening criteria used in lieu of a performance standard for visual capability that directly measures visual acuity, perception and field-of-view, etc., the factors which form the basis of the vision standard in 49 C.F.R. 391.41(b)(10). A performance standard would relate the applicant's visual capability to individual performance of the driving task in commercial motor vehicles.

[3]FMCSA uses identical wording all renewal notices. *See, e.g.,* 67 FR 57266 (Sept. 9, 2002); 67 FR 10476 (June 3, 2002); 66 FR 66969 (Dec. 2001); 66 FR 48505 (Sept. 20, 2001).

exemption (or exemptions) for each applicant requesting an additional two-year exemption, as part of the record for the subsequent exemption request. In the public notice for an applicant's first exemption request, the agency insists that each applicant have three years driving experience immediately prior to the date of the application, and obtains self-reported information regarding the applicant's driving experience, and examines the applicant's official state driving record for the three year period immediately preceding the application. All of that information is published in the agency notice for the initial exemption request which sets out for each applicant, individually, their driving record and whether the applicant has had any recent accidents or violations and the nature of the offense, if any. The notices for subsequent applications, however, routinely state only that "over the past 2 years [] each applicant continues to meet the vision exemption standards.@ 67 FR 71611. This is a general conclusion that provides no specific detailed information and, in an undifferentiated manner, dispenses with any factual recitation of driving record violations as well as other portions of the factual record and agency exemption criteria.

In this particular instance, the egregious nature of the procedural violation is underscored by the fact that the FMCSA notice simply lists all 44 applicants by name without any providing any individualized information or assessment of each applicant's individual driving and safety record during their previous two-year exemption. *Id.* Even more egregious, for the two applicants seeking a third two-year exemption, the agency has not disclosed whether they have been involved in crashes or received citations, as well as other pertinent factual information, for the past four (4) years during which they have held an exemption, covering their initial exemption and the previously granted second two-year exemption.[4] This is not the process or

[4] Applicants Michael L. Manning and Bruce T. Loughary were each previously granted a *second* two-year exemption. *See* 65 FR 66293 (Nov. 3, 2000), and 65 FR 77069 (Dec. 8, 2000), respectively. In granting each of these applicants a second two-year exemption, FMCSA did not present to the public any specific information regarding their driving record, driving mileage, type of vehicle driven or other factual information regarding the applicant's driving experience during their first two-year exemption period. By granting a further, in this instance third, two-year exemption (each applicant's fifth and sixth consecutive years of exemption), the agency is granting the exemption without disclosing to the public any factual information regarding these applicants driving record and history during the past four years immediately preceding the application for the third two-year exemption.

procedure required in the statute.

The FMCSA also refers to additional exemption applications as Arenewals,@ and apparently the agency believes that it is free to dispense with prior public notice as well as the need to provide Arelevant information@ since the same applicant was granted an exemption two years, or four years, earlier. However, the statutory scheme recognizes no exception in the required procedures for subsequent exemptions by an applicant who has previously been granted an exemption, and the statute makes no provision for truncating public notice and information disclosure in the case of the Arenewal@ of an exemption. Indeed, the term Arenewal@ does not appear in the text of the statute. The agency must, therefore, treat each application for exemption as a separate request for a determination and order which, in fact, they are. Each such application must be accorded separate review, prior public notice, and all safety analysis and Aother relevant information@ must be disclosed to the public. While the agency can reference relevant factual information in conjunction with a previous exemption request, by so doing the agency is not relieved of the burden to disclose specific Arelevant information@ that has occurred during the course of the prior two-year exemption. Unfortunately, the agency has chosen to truncate its exemption procedures in the case of Arenewals,@ and not only does the agency fail to disclose specific factual information except in conclusory terms, the agency has decided to short-circuit public notice and comment procedures as well.

Advocates objects to the issuance of the FMCSA final decision as a *fait accompli* without providing prior notice and opportunity for public comment as required by 49 U.S.C. ' 31315. The agency has summarily granted the exemptions, effective December 8, 2002, without prior notice and an opportunity for public comment before the agency rendered its determination on the exemptions.5 As has already been stated, applications for a subsequent two-year exemption are subject to the same notice and comment process as required for the initial determination to grant the first such exemption. In this and other instances of drivers seeking a second or additional two-year exemptions from the federal vision requirement, the agency has only provided an opportunity for public comment after the determination to grant the exemption has already been made and taken effect. This practice violates both the fundamental due process requirements secured under the Administrative Procedure Act (APA), 5 U.S.C. ' 553 *et seq.,* as well as the explicit wording and procedures required by 49 U.S.C. ' 31315.

The FMCSA has asserted that the statute is Asatisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequently submitted comments by interested parties.@ 66 FR 17994, 17995 (Apr. 4, 2001). This response ignores the agency=s statutory

[5] It appears that FMCSA has decided to grant additional two-year exemptions from the vision standard in perpetuity, and with little regard for statutory formality or public notice and due process, to applicants who have previously been granted an initial two-year exemption.

duty and cannot overcome the intent of Congress. The express wording of the statute requires that the notice be published upon receipt of a request for an exemption, and that includes any request for a second and subsequent two-year term of exemption (*i.e.,* a "renewal"), and that the public be afforded an opportunity to inspect the safety analysis and other relevant information known to the Secretary prior to making the safety determination. No exception or special treatment is afforded subsequent or Arenewal@ applications for exemption. This is the appropriate construction of the statute and the agency statement that it prefers to proceed in a different manner does not explain or excuse its failure to abide by the statutorily mandated process.

FMCSA characterizes the request for an additional two-year exemption as a Arenewal@ of an existing exemption. The treatment of the application for a second, and third, exemption indicates that the agency does not believe that it must afford the public the same due process that accompanies the application for an initial two-year exemption.[6] The agency does not provide prior notice and opportunity for public comment on applications for renewals of exemptions and, as has been discussed above, the agency does not disclose the same type of driver record information that is part of the initial exemption application process. Any reliance by FMCSA on nomenclature as a basis for according different procedural due process to Arenewals@ as opposed to initial exemption applications, is misplaced because Congress made no such distinction in the statute. FMCSA=s reliance on the term Arenewal@ is without legal import since the statute does not use that term nor does it define an exemption renewal as permitting a different process from any other application for a two-year exemption.

In addition to being a clear violation of the meaning and the purpose of the statute, this procedure violates due process considerations and the dictates of the APA. The agency is not at liberty to abrogate public notice and comment due process simply because it is convenient. The agency propounds no legitimate argument to support its short-circuiting of APA required procedural due process.

For these reasons Advocates requests that the FMCSA reconsider its process and procedures for dealing with applications for second vision exemptions.

---

[6]FMCSA, and its predecessor agency, the Federal Highway Administration Office of Motor Carrier Standards, engaged in the practice of making the safety determinations to grant vision exemptions prior to issuing a public notice and providing an opportunity for public comment. Following criticism of this procedure as a violation of the statute and APA due process requirements, the agency stopped making such Apreliminary@ safety determinations in advance of notice and comment. Advocates raises the same objection regarding the agency=s use of this illegal procedure with respect to applications for second and subsequent vision exemptions. In this instance, however, not only is FMCSA making its determination prior to public notice and opportunity for public comment, but the agency is also withholding from the public the factual basis on which it is making its peremptory and secret safety determination.

ORIGINAL SIGNED

_____
Henry M. Jasny
General Counsel